STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 172304

Pursuant to petition filed February 26, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General (OIG) to disqualify [redacted] from receiving FoodShare benefits (FS) one year, a telephone hearing was held on Tuesday, May 24, 2016 at 11:00 AM.

This hearing was originally scheduled for April 12, 2016 at 10:00 a.m. The Petitioner was expected to be at [redacted] for the hearing. It was discovered on the date of hearing that the Petitioner had been released from custody, but he did not call Hearings and Appeals to provide a phone number where he could be reached. Unsuccessful attempts were made to reach the Petitioner at two different numbers that were in the agency's records. Consequently, the hearing proceeded in his absence, as required by Federal Regulations.

The Petitioner called Hearings and Appeals on April 14, 2016, and indicated that he did not receive the notice from the Office of Inspector General. The Petitioner waived the 30-day notice requirement and asked for the matter to be rescheduled to the next available hearing date. Accordingly, the hearing was rescheduled to May 3, 2016 at 11:45.

On May 3, 2016, I was unable to reach the Petitioner at the appointed time, but left a voicemail message for him. So, the hearing again, took placed without the Petitioner. At the May 3, 2016 hearing, OIG presented additional evidence consisting of an e-mail chain dated April 28, 2016, and the testimony of [redacted] from the [redacted] Office.

Later on May 3, 2016, the Petitioner called and indicated that he was having problems with his phone and that my phone call to him did not go through. The Petitioner asked for another hearing date. Accordingly, the hearing was rescheduled to May 24, 2016, at 1:15 a.m.

On May 4, 2016, I sent the Petitioner and OIG copies of a recording of the hearing that took place on May 3, 2016, so that the Petitioner could review the testimony of [redacted] and decide whether he wanted to subpoena her for further testimony.

On or about May 11, 2016, the Petitioner called with two concerns. First, he indicated that he was unable to play the CD and second, that he was unavailable at 1:15 and would prefer a morning time slot.

With regard to the playability of the CD, the Petitioner was instructed to try a computer at the library. Staff at DHA indicated that both CDs were tested and were able to be played. An e-mail was sent to OIG to see if they had a problem with their CD and OIG indicated no problems playing the CD.

With regard to the hearing time, the Petitioner was informed that the hearing could be moved to either 11:00 or after 3:00, subject to agreement by OIG. It is my recollection that I called OIG to see if either time slot would work, and was told that the 11:00 time slot was preferable. As such, the hearing time was moved to 11:00, though no new notices were issued.

On May 12, 2016, OIG submitted a letter, asking that the recorded testimony of [redacted] be admitted at the May 24, 2016 hearing.

The hearing took place as scheduled on May 24, 2016, at 11:00 a.m. Due to some miscommunication, the OIG representative did not participate in the hearing.

At the May 24, 2016 hearing, the testimony of [redacted] was played for the Petitioner, because he once again complained that he was unable to play the CD. It should be noted for the record, that the CD played at the hearing, was the one originally sent to OIG at the same time Petitioner was mailed his copy and it worked fine.

The Petitioner objected, claiming that he could not hear the recording. However, there were no issues playing the CD. As such, the objection was overruled. Given that the OIG representative was not available and given that the recorded testimony of [redacted] was staying in the record, the Petitioner was asked how he wanted to proceed and he indicated that he wanted to go forward with the hearing. The hearing proceeded and was completed on May 24, 2016.

The CD has been marked as Exhibit 9 and entered into the record.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES #[redacted]) is a resident of Monroe County who received FoodShare benefits between January 2015 through July 2015. (Exhibit 5C)

2. The Respondent was in custody at the [redacted] from March 7, 2015 through September 17, 2015. (Testimony of Respondent; Exhibit 8 and Exhibit 9)

3. On March 20, 2015 the [redacted] released the Petitioner's wallet, which contained his EBT card to his friend, [redacted]. (Testimony of Respondent; Exhibits 8 and 9)

4. The Petitioner's EBT card was used numerous times between March 20, 2015 and June 20, 2015, while the Petitioner was still in jail. (Exhibit 4A)

5. On March 7, 2016, and again on May 4, 2016, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent committed an intentional program violation by allowing someone outside his FoodShare household to use his FoodShare benefits while he was incarcerated between March 20, 2015 and June 20, 2015. (Exhibit 1)

DISCUSSION

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations "shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device)."

The Department's written policy restates federal law, below:

> **3.14.1 IPV Disqualification**
> 7 CFR 273.16
> A person commits an Intentional Program Violation (IPV) when s/he intentionally:
> 1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
> 2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

> 1. Federal, state, or local court order,
> 2. Administrative Disqualification Hearing (ADH) decision,
> 3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
> 4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.
>
> *FoodShare Wisconsin Handbook,* §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

> Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

> Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992.

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there might be reasonable doubt that the elements have been shown.

The Merits of OIG's Case

In the case at hand, OIG asserts that the Respondent violated the rules of the FoodShare / food stamp program by allowing someone to use his EBT card while he was incarcerated.

> 7 CFR §274.7 Benefit redemption by eligible households.
>
> (a) *Eligible food.* Program benefits may be used only by the household, or other persons the household selects, to purchase eligible food for the household, which includes, for certain households, the purchase of prepared meals, and for other households residing in certain

designated areas of Alaska, the purchase of hunting and fishing equipment with benefits. *Emphasis added*

It is undisputed that the Petitioner was incarcerated at the [redacted] between March 2015 and June 2015, and it is undisputed that the Petitioner released his property, including his EBT card to his friend, [redacted], in March 2015. Exhibit 4A indicates that the Petitioner's EBT card was used numerous times between March 20, 2015 and June 20, 2015. Exhibit 5B

The Petitioner testified that he did not give anyone permission to use his EBT card, and therefore, did not intend to allow someone outside his household to use his FoodShare benefits.

Intention is a subjective state of mind to be determined upon all the facts, Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977), but there is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131.

The totality of the circumstances shows that the Petitioner intentionally violated the rules of the FoodShare Program.

First, the county agency sent the Petitioner an Eligibility and Benefits Booklet on October 22m 2014, that warned the Petitioner about the penalties for violating program rules and that warned him about safeguarding his PIN. (See Exhibit 6)

Second, Petitioner's testimony was not credible. The Petitioner initially stated that his landlord cleared out his belongings from his apartment and that is how his wallet went missing, but then the Petitioner later acknowledge releasing his wallet and EBT card to [redacted]. When asked how someone would have gotten his PIN, he indicated that he might have "put it with his card", but didn't remember. When asked what he meant, by putting the pin number with the card, the Petitioner stated that he wasn't sure what he meant and again claimed to have memory problems, along with a plethora of other physical disabilities.

Third, it doesn't make sense to hang on to a stolen card for three months and use it over and over again, thereby increasing the chances of being caught. Exhibit 4A shows the card was used over 50 times in three month period between March and June 2016.

Fourth, while there is no direct evidence establishing who was using the card during the time in question, it is reasonable take a negative inference from the Petitioner's questionable testimony and to conclude that the person using the card had to have permission to do so, since the person had the Petitioner's PIN and the Petitioner has no credible explanation for why.

Based upon all of the foregoing, it is found that the Petitioner intended for someone outside his household to use his FoodShare benefits, while he was incarcerated.

CONCLUSIONS OF LAW

OIG has met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program between March 20, 2016, and June 20, 2016, by allowing someone outside his household to use his FoodShare benefits, contrary to 7 CFR §274.7. This is the first such violation.

NOW, THEREFORE, it is **ORDERED**

That OIG's IPV determination is sustained, and that OIG may disqualify the Respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin, this 20th day of June, 2016

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[redacted] - email

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The preceding decision was sent to the following parties on June 20, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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